Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W–01–55 & 54 OF 2003, W–02–758, 759 & 760 OF 2003
RICHARD MALANJUM, HASHIM YUSOFF AND BAHARUDIN JJCA
6 APRIL 2004

Land Law — Housing developers — Remedies of purchaser — Late delivery — Homebuyers lodged claims with Tribunal Tuntutan Pembeli Rumah — Tribunal began to function on 1 December 2002 — Whether Tribunal had jurisdiction to adjudicate upon claims brought in respect of sale and purchase agreements entered into before 1 December 2002

Statutory Interpretation — Construction of statutes — Intention of Parliament — Homebuyers lodged claims with Tribunal Tuntutan Pembeli Rumah — Tribunal began to function on 1 December 2002 — Whether Parliament intended to restrict jurisdiction of Tribunal

The homebuyers lodged their claims with the Tribunal Tuntutan Pembeli Rumah ('the Tribunal') for liquidated damages in connection with the late delivery of homes purchased by them from the respective licensed housing developers ('the respondents'). The Tribunal came into existence with the passing of the Housing Developers (Control and Licensing) (Amendment) Act 2002 ('the Amending Act') and began to function on 1 December 2002 vide Gazette notification PU(B) 353/2002 ('the appointed date'). The Tribunal heard claims which were brought before it irrespective of the dates of the sale and purchase agreements ('SPAs'). The respondents filed several applications by way of notice of motion for judicial review. With the agreement of all parties, the learned High Court judge heard one application with binding effect on the others. His Lordship granted the relief sought by the respondents and held that in the absence of any express provision to the contrary, the Amending Act had no retrospective effect on the SPAs. The net effect was that the Tribunal was incapable of hearing claims based on SPAs entered into before the appointed date. The appellants appealed.

Held, allowing the appeal:

(1) Section 16N(2) of the Housing Developers (Control and Licensing) Act 1966 ('the Principal Act') as amended by the Amending Act provided the perimeter of the jurisdiction of the Tribunal and s 16N(2) did not stipulate a cut-off point by reference to the date of the SPAs vis-à-vis jurisdiction. All that was required of the Tribunal in assuming jurisdiction to hear a claim presented before it was to verify whether: (a) the claim was based on a cause of action arising from the SPA entered into between the homebuyer and the licensed developer; and (b) the claim was brought by a homebuyer not later than 12 months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the SPA. No additional or prerequisite term should be read into the provision. To do so would be tantamount to adding what was not in the statute (see paras 18–20).

(2) To limit the jurisdiction of the Tribunal to claims based on SPAs entered into after the appointed date would be to restrict the jurisdiction of the Tribunal which Parliament never intended to do. It was absurd to say that Parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of the SPAs entered into as recent as the appointed date (see para 22).

(3) Nothing in s 16AD of the Principal Act (as amended by the Amending Act) could be understood to mean that a breach of a SPA between a homebuyer and a licensed housing developer was a crime per se. The criminal aspect of s 16AD only came into play when there was a failure of the part of the licensed housing developer to comply with an award given by the Tribunal. In any case, s 16AD did not empower the Tribunal to impose any penalty. It only provided for a defaulter to be subject to prosecution which invariably was the task of another authority in a separate criminal proceeding. On being prosecuted, a defaulter was at liberty to raise in defence the inapplicability of the section to him. Accordingly, s 16AD did not take away any substantive right of any person (see paras 24–25, 28).

(4) Therefore, the Tribunal had the jurisdiction to entertain and adjudicate upon the claims lodged with it notwithstanding that the SPAs were entered into before 1 December 2002. The issue of retrospectively of s 16AD vis-à-vis an award given by the Tribunal should not arise (see para 1).

[**Bahasa Malaysia summary**

Pembeli-pembeli rumah telah membuat tuntutan mereka dengan Tribunal Tuntutan Pembeli Rumah ('Tribunal tersebut') untuk ganti rugi jumlah tertentu berkaitan serahan lewat rumah-rumah yang dibeli oleh mereka daripada pemaju perumahan berlesen masing-masing ('responden-responden'). Tribunal tersebut wujud dengan kelulusan Akta Pindaan Pemaju-Pemaju Perumahan (Kawalan dan Pelesenan) 2002 ('Akta Pindaan tersebut') dan mula berfungsi pada 1 Disember 2002 melalui Warta pemberitahuan PU(B) 353/2002 ('tarikh lantikan'). Tribunal tersebut telah mendengar tuntutan-tuntutan tersebut yang dikemukakan di hadapannya tanpa mengira tarikh-tarikh perjanjian-perjanjian jualbeli ('PPJB tersebut'). Responden-responden telah memfailkan beberapa permohonan melalui notis usul untuk kajian semula. Dengan persetujuan semua pihak, hakim Mahkamah Tinggi telah mendengar salah satu daripada permohonan tersebut yang mempunyai kesan mengikat permohonan-permohonan lain. Yang Arif telah memberi relif yang dipohon oleh responden-responden dan memutuskan bahawa tanpa adanya apa-apa peruntukan yang nyata yang bertentangan, Akta Pindaan tersebut tiada kesan kebelakangan ke atas PPJB tersebut. Akibat langsungnya adalah bahawa Tribunal tersebut tidak layak untuk mendengar tuntutan-tuntutan tersebut berdasarkan PPJB tersebut yang disempurnakan sebelum tarikh lantikan tersebut. Perayu-perayu telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Seksyen 16N(2) Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta Utama') sebagaimana yang dipinda oleh Akta Pindaan tersebut memperuntukkan sempadan bidang kuasa Tribunal tersebut dan s 16N(2) tidak menetapkan had melalui rujukan tarikh PPJB tersebut bertentangan dengan bidang kuasa. Apa yang diperlukan oleh Tribunal tersebut dalam mengandaikan bidang kuasa untuk mendengar tuntutan yang dikemukakan di hadapannya adalah untuk menentukan sama ada: (a) tuntutan tersebut berdasarkan kausa tindakan yang timbul daripada PPJB tersebut yang disempurnakan antara pembeli rumah dan pemaju berlesen; dan (b) tuntutan tersebut telah dimulakan oleh pembeli rumah tidak lebih daripada 12 bulan daripada tarikh pengeluaran sijil kelayakan penghunian untuk penginapan perumahan atau tempoh liabiliti kecacatan sebagaimana yang ditetapkan dalam PPJB tersebut. Tiada terma tambahan atau pra syarat patut dibaca ke dalam peruntukan tersebut. Untuk berbuat demikian sama seperti menambah apa yang bukan dalam statut (lihat perenggan-perenggan 18–20).

(2) Untuk menghadkan bidang kuasa Tribunal tersebut kepada tuntutan-tuntutan berdasarkan PPJB tersebut yang disempurnakan selepas tarikh lantikan akan bermakna menyekat bidang kuasa Tribunal tersebut yang Parliamen tidak berniat berbuat demikian. Adalah keterlaluan untuk mengatakan bahawa Parliamen dalam menggubal untuk penubuhan Tribunal tersebut sedar bahawa ia akan hanya melaksanakan tujuannya beberapa tahun kemudian memandangkan tidak dapat dibayangkan bahawa tuntutan-tuntutan tersebut akan timbul akibat perlanggaran-perlanggaran PPJB tersebut yang disempurnakan seawal tarikh lantikan (lihat perenggan 22).

(3) Tiada apa-apa dalam s 16AD Akta Utama (sebagaimana yang dipinda oleh Akta Pindaan tersebut) boleh difahamkan sebagai bermaksud bahawa satu perlanggaran PPJB antara pembeli rumah dan pemaju berlesen adalah satu jenayah per se. Aspek jenayah s 16AD hanya berfungsi apabila berlaku kegagalan di pihak pemaju perumahan berlesen untuk mematuhi award yang diberikan oleh Tribunal tersebut. Apapun, s 16AD tidak memberi kuasa kepada Tribunal tersebut untuk mengenakan apa-apa penalti. Ia hanya memperuntukkan seorang yang melakukan kegagalan tertakluk kepada pendakwaan yang selalunya tugas badan berkuasa lain dalam satu prosiding jenayah berasingan. Semasa didakwa, seorang yang melakukan kegagalan bebas menimbulkan sebagai pembelaan bahawa seksyen tersebut tidak terpakai terhadap beliau. Sewajarnya, s 16AD tidak mengambil apa-apa hak substantif sesiapa (lihat perenggan-perenggan 24–25, 28).

(4) Oleh demikian, Tribunal tersebut mempunyai bidang kuasa untuk melayan dan mengadili tuntutan-tuntutan yang dikemukakan kepadanya meskipun PPJB tersebut telah disempurnakan sebelum 1 Disember 2002. Persoalan kebelakangan s 16AD bertentangan dengan award yang diberikan oleh Tribunal tersebut tidak sepatutnya timbul (lihat perenggan 1).]

Notes

For cases on remedies of purchasers, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2623.

Cases referred to

Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia [2003] 1 MLJ 1 (refd)
Colonial Sugar Refining Co Ltd v Irving [1905] AC 369 (refd)
Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1 (refd)
Energoprojek (M) Holdings v Public Prosecutor [1998] 5 MLJ 401 (refd)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)
Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor [2001] 3 MLJ 705 (refd)
Kesultanan Pahang v Sathask Realty Sdn Bhd [1998] 2 MLJ 513 (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1 (refd)
NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd [1987] 1 MLJ 39 (refd)
Sea Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (refd)

Legislation referred to

Federal Constitution art 7
Housing Developers (Control and Licensing) Act 1966 s 22C
Housing Developers (Control and Licensing) (Amendment) Act 2002 ss 16AD, 16M, 16N(2), 16O, 16R, 32(2)
Industrial Relations Act 1967

Abdul Gani Patail (Azhar Mohamad and Umi Kalthum Abd Majid with him) (Attorney General's Department) for the appellants in Civil Appeals No W–01–54 of 2003 and W–01–55 of 2003.
KL Wong (KY Soo with him) (KL Wong) for the appellant in Civil Appeal No W–02–758 of 2003.
Viola Lettice De Cruz (Maureen Ong Swee Kin with her) (VL Decruz & Co) for the appellant in Civil Appeal No W–02–759 of 2003.
Yong Yung Choy (Mohd Noh Nasira and Soon Lay Kheng with him) (Nasira Aziz & Co) for the appellants in Civil Appeal No W–02–760 of 2003.
Sree Harry (Sri Ram & Co) for the respondents in Civil Appeals No W–01–54 of 2003, W–02–758 of 2003, W–02–759 of 2003 and W–02–760 of 2003.
Lambert Rasa – Ratnam (Sean Yeow Huang Meng, Mong Chung Seng and Foo Joon Liang with him) for the respondent in Civil Appeal No W–01–55 of 2003.

Richard Malanjum JCA (delivering judgment of the court):

[1] On 18 December 2003, we allowed the appeals by the appellants. And upon agreement of the parties we made no order as to costs. In giving our short oral judgment, we stated that we were unanimous in our decision. We expressed our view that the tribunal has the jurisdiction to entertain and to adjudicate upon claims lodged with it notwithstanding the sale and purchase agreements were entered into before 1 December 2002. And accordingly, the issue of retrospectivity of s 16AD vis-a-vis an award given by the tribunal

should not arise. We also stated that we would give our reasons later. We do so now.

[2] These appeals arose from the decision of the court below granting the respondents, inter alia, an order of certiorari to quash the awards handed down by the tribunal in respect of several claims lodged by the claimants/homebuyers, a declaration that the said awards given were invalid, ultra vires, null and void and of no consequence, that the tribunal had no jurisdiction to hear and determine the claims lodged by the claimants/homebuyers thereof and an order prohibiting the tribunal from hearing such claims.

[3] Since the issue of jurisdiction of the tribunal in relation to sale and purchase agreements entered into before 1 December 2002 was common to all the appeals, it was therefore agreed that we should hear them together.

[4] We emphasise here that the issue of jurisdiction of the tribunal is being questioned only in relation to sale and purchase agreements entered into by the claimants/homebuyers before 1 December 2002, a date crucial, since that was when the tribunal began to function vide gazette notification PU (B) 353/2002 ('the appointed date').

[5] Now, it was not in dispute that the claimants/homebuyers lodged their claims with the tribunal for liquidated damages in connection with the late delivery of homes purchased by them from the respective respondents, being the licensed housing developers.

[6] As background, the tribunal came into existence with the passing of the Housing Developers (Control and Licensing) (Amendment) Act 2002 ('the Amending Act'). The principal statute is the Housing Developers (Control and Licensing) Act 1966 ('the Principal Act'). And for clarity the sections referred to in this judgment are sections of the Principal Act as amended.

[7] Prior to the orders rendered by the court below, the tribunal heard claims which were brought before it irrespective of the dates of the sale and purchase agreements. However, the respondents herein held a view otherwise. Several applications were therefore filed by way of notice of motion for judicial review.

[8] With the agreement of all parties, the learned judge in the court below heard one application with binding effect on the others. And on 4 September 2003, the learned judge rendered judgment wherein he granted the relief sought for by the respondents with the net effect that the tribunal was for all intents and purposes rendered incapable to hear claims based on sale and purchase agreements entered into before the appointed date.

[9] The gist of the decision of the learned judge is that in the absence of any express provision to the contrary the Amending Act has no retrospective effect on sale and purchase agreements entered into before the appointed date. He held that to do so would be an infringement of art 7 of the Federal Constitution in view of the provision whereby penalty could be imposed for any failure to comply with an award handed down by the tribunal. Indeed,

the learned judge considered that any failure to comply with an award granted by the tribunal would merely be an extension of the breach upon which the award was given. The learned judge was also of the view that to allow retrospective effect of the jurisdiction of the tribunal would result in the substantive rights of the respondents being affected to their prejudice.

[10] Before us, the learned Attorney General argued, inter alia, that the tribunal has the jurisdiction to hear and determine claims based on a sale and purchase agreement entered into prior to the appointed date. He referred to s 16N(2) thereof. And he contended that s 16R admits the possibility of a retrospective application of the said section. He went on to point out that assent to the Amending Act was given on 23 January 2002 followed by the publication on 31 January 2002 but it only came into force on 1 December 2002 together with the regulations providing for the procedure to be observed by the tribunal. That according to him indicates the intention of applying s 16N(2) retrospectively.

[11] The reference by the learned judge to s 32(2) of the Amending Act which extended the application of the new s 22C in the Principal Act as being a specific indication of retrospective intention as opposed to the absence of similar provision in s 16N(2) thereof was noted by the learned Attorney General as erroneous in view of the limited purpose of that section.

[12] For the respondents it was submitted that s 16N(2) has no application to the notion of retrospectivity. That section simply serves to limit the jurisdiction of the tribunal where it has jurisdiction by virtue of s 16M. And it was further submitted that if it was the intention of Parliament to allow retrospective effect, it would have done so by inserting a similar provision to that of the new s 22C of the Principal Act.

[13] Learned counsel for the respondents gave the reasons why this court must not construe the jurisdiction of the tribunal as having retrospective effect. Firstly, it was contended that to do so would effectively be allowing a criminal provision enacted into the Principal Act vide the Amending Act to have retrospective effect in the absence of any specific enabling provision. Learned counsel of course was referring to the provision whereby there would be a penalty imposed for failing to comply with an award granted by the tribunal. Secondly, the fact that a criminal provision was incorporated should indicate that there was no intention to legislate with retrospective effect bearing in mind the strong presumption against statutes with criminal consequence to operate retrospectively.

[14] The diametrically opposed contentions of the parties before us demand close scrutiny of the relevant provisions brought about by the Amending Act. And having done so we agree that whilst there is no provision expressly specifying the jurisdiction of the tribunal in respect of sale and purchase agreements entered into before the appointed date, we do not think such fact should be taken as affirming the argument of the respondents. To do so would be contrary to a settled principle of law that statutes must be read as a whole (see *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513). And literal interpretation of a statute is not applicable in all cases. There are

circumstances where the nature and purpose of a particular legislation must be considered when construing its various provisions so as not to defeat the intention of Parliament (see *Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2003] 1 MLJ 1; *Sea Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31).

[15] In the instant case we are of the view that the Principal Act as amended by the Amending Act is a piece of social legislation and hence its provisions should be given liberal and purposive interpretation. In the case of *Kesatuan Kebangsaan Wartawan Malaysia & Anor v Syarikat Pemandangan Sinar Sdn Bhd & Anor* [2001] 3 MLJ 705, the Federal Court speaking through his Lordship Steve Shim CJ (Sabah and Sarawak) on the Industrial Relations Act 1967 said this at p 710:

> Quite clearly, the IRA is a piece of social legislation whose primary aim is to promote social justice, industrial peace and harmony in the country. As such, the approach to interpretation must be liberal in order to achieve the object aimed at by Parliament. This had been described by Lord Diplock as the 'purposive approach', an approach followed by Lord Denning in *Nothman v Barnet London Borough Council* [1978] 1 WLR 220, who reiterated that in all cases involving the interpretation of statutes, we should adopt a construction that would promote the general legislative purpose underlying the provision. We accept that to be the correct approach.

[16] A similar view was also expressed by the Federal Court in the case of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 where it was said at p 387:

> Now, it is well settled that the Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In accordance with well settled canons of construction, such legislation must receive a liberal and not a restricted or rigid interpretation. If authority is required for this proposition, it is to be found in the decision of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317. The three interconnected definitions which were cited by Salleh Abas LP in his judgment in *Inchcape* as well as s 20 (under which the instant respondent's case was referred to the Industrial Court) appear in a statute requiring liberal interpretation and for that reason should themselves be liberally interpreted, per Gopal Sri Ram JCA.

[17] Applying therefore the liberal and purposive approach to the statutory provisions that deal with the jurisdiction of the tribunal, we find that the argument advanced for the respondents is premised on at least two assumptions. Firstly, that the date in a sale and purchase agreement is material in determining the jurisdiction of the tribunal. Secondly, any award given for a breach of a sale and purchase agreement entered into prior to the appointed date, particularly where the breach was before that date, would tantamount to allowing criminal law to operate retrospectively since it is now punishable being an offence for any failure to comply with or satisfy such award. This argument of course relates to the legal principle that criminal law cannot be made to operate retrospectively unless specifically stipulated (see *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1).

[18] With respect, we find the first assumption to be without any basis. There is nothing in the provisions establishing the tribunal or related thereto which can be said to support it. In our view while s 16M sets out the general jurisdiction of the tribunal, it is s 16N and in particular subsection 16N(2) thereof that provides the perimeter of the jurisdiction of the Tribunal. Section 16N(2) reads:

> Limitation of jurisdiction.
>
> (1) Except as expressly…
>
> (2) The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement.

[19] Sub-section 16N(2) does not stipulate a cut off point by reference to date of agreement vis-a-vis jurisdiction. All that is required of the tribunal in assuming jurisdiction to hear a claim presented before it is to verify whether it is within the ambit of subsection 16N(2), that is to say:

(a) whether the claim is based 'on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer'*;* and

(b) whether the claim is 'brought by a homebuyer not later than 12 months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement'.

[20] We do not think there should be any additional or prerequisite term to be read into the provision. To do so would tantamount to adding what is not in the statute. And that should not be done since judges are not legislators. That was echoed in *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39 with these words:

> It must always be borne in mind that we are judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by parliament, In enforcing the law we must be the first to obey it. Itshould be noted that the power of a court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act which it may be called upon to interpret. per Seah SCJ at p 39.

[21] In fact the need for a sale and purchase agreement as a condition-precedent in filing a claim has also been waived by subsection 16N(3) thereof which states that '(N)otwithstanding subsection (2) no claim shall be affected or defeated on the ground that no sale and purchase agreement has been entered into between the homebuyer and the licensed housing developer at the time when the cause of action accrues if there exists a previous dealing

between the homebuyer and the licensed housing developer in respect of the acquisition of the housing accommodation'.

[22] To limit therefore the jurisdiction of the tribunal to claims based on sale and purchase agreements entered into after the appointed date would tantamount to restricting the jurisdiction of the tribunal which parliament never intended to do so. It is absurd in our view to say that parliament proceeded to legislate for the establishment of the tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into as recent as the appointed date. Meanwhile, the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which parliament intended to address when it legislated for the establishment of the tribunal. As stated earlier, being a piece of social legislation a liberal and purposive approach should be adopted when construing the legislative provisions governing the threshold jurisdiction of the tribunal.

[23] In respect of the second assumption, such approach came about in view of s 16AD. It reads:

> Criminal penalty for failure to comply.
>
> (1) Any person who fails to comply with an award made by the Tribunal within the period specified therein commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.
>
> (2) In the case of a continuing offence, the offender shall, in addition to the penalties under subsection (1), be liable to a fine not exceeding one thousand ringgit for each day or part of a day during which the offence continues after conviction.

[24] However, that section should be read in its proper perspective and should be given a purposive interpretation as well. At any rate nothing stipulated therein could be understood to mean that a breach of a sale and purchase agreement between a homebuyer and a licensed housing developer is a crime per se. A breach only gives a homebuyer the right to claim against a licensed housing developer. And prior to the establishment of the tribunal such claim could only be filed in the civil court. In fact a claim that is not within the ambit of ss 16M and 16N remains outside the jurisdiction of the tribunal though s 16O is an exception.

[25] Accordingly in our opinion s 16AD only comes into play when there is a failure on the part of a licensed housing developer to comply with an award given by the tribunal. In other words, the criminal aspect of the provision only arises when there is a failure to abide by an award of the tribunal and not due to a breach of a sale and purchase agreement upon which a claim is made. It is in fact equivalent to an execution proceeding as generally understood in the civil court. Thus, we are not persuaded by the argument that s 16AD has made an award handed down by the tribunal synonymous to a breach of a sale and purchase agreement. A breach is a cause giving rise to a claim while an award is a relief.

[26] Put in another way, s 16AD does not penalize a licensed housing developer for a breach simpliciter of a sale and purchase agreement. The penalty only comes into play when there is a failure to comply with or satisfy an award handed down by the tribunal after adjudicating a claim based on a breach of a sale and purchase agreement irrespective of its date. That in our view is a fair, liberal and purposive interpretation of the section. And since the tribunal only began to function from the appointed date the question of an award handed down before that date and the application of s 16AD for failure to comply does not arise.

[27] We are conscious of the counter-argument that without a breach in the first place there is no question of an award being given by the tribunal and without an award there is no issue of penalty arising. And if a breach occurred before the appointed date that would effectively be criminalizing an act retrospectively.

[28] With respect, a distinction should be drawn between a breach of the sale and purchase agreement and an award rendered arising from such breach. As we have stated earlier on, it is not the breach of the sale and purchase agreement that has been criminalized. Rather, it is the failure to comply with or satisfy any award given by the tribunal in connection with any claim made pursuant to such breach. At any rate, s 16AD does not empower the tribunal to impose any penalty. It only provides for a defaulter to be subject to prosecution which invariably is the task of another authority in a separate criminal proceeding. And on being prosecuted a defaulter is at liberty to raise in defence the inapplicability of the section to him. Such approach was successful in the case of *Energoprojek (M) Holdings v Public Prosecutor* [1998] 5 MLJ 401. Accordingly, we do not think s 16AD is intended to take away any substantive right of any person. Neither is it meant to affect or limit the jurisdiction of the Tribunal in any manner howsoever.

[29] The reference to s 22C thereof by way of comparison to indicate the intention of parliament is irrelevant in our opinion. That provision is only an enabling section in relation to another matter and is not related to the issue of jurisdiction of the Tribunal. Section 22C provides:

Right to initiate and maintain actions.

> Notwithstanding anything contained in any written law or any rule of law, a homebuyer as defined in s 16A shall be entitled on his own volition and in his own name to initiate, commence, institute and maintain in any court or tribunal any action, suit or proceeding against a housing developer or any other person in respect of any matter arising out of the sale and purchase agreement entered into between the purchaser and that housing developer unless a contrary intention is expressed in any agreement, assignment or charge between the homebuyer and his financier in which case the prior written consent of his financier must first be obtained before he exercises any of his rights under this section.

(2) Every agreement, assignment or charge lawfully entered into between a purchaser and his financier before the appointed date shall be subject to, and

A the parties thereto shall be entitled to the benefits of, the new s 22C of the principal Act as inserted into the principal Act by subsection (1).

[30] It was also the contention of learned counsel for the respondents that in view of the penalty attached with the establishment of the tribunal to allow it therefore to hear a claim based on a sale and purchase agreement
B entered into before the appointed date would affect and prejudice the substantive rights of the respondents.

[31] In our view, such argument is focused on the presence of the penalty for default in complying with an award handed down by the tribunal. And for the reasons we have given hereinabove, in particular, on the penalty vis-a-vis
C the award issue, we do not think it has any merit.

[32] It is to be noted that the establishment of the tribunal is in effect a creation of another forum intended for speedy disposal at a minimum cost of prescribed claim up to the limit of RM25,000 by a homebuyer against a licensed housing developer for breach of a sale and purchase agreement
D entered into by the parties. There is therefore no question of the rights of anyone being eroded or removed as was envisaged in the *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 (PC) (see also *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1).

[33] And although it may be argued that the imposition of penalty has a prejudicial effect, such preposition may be true if it is the breach of a sale
E and purchase agreement that has been criminalized. But here it is not the case.

[34] As regards the other points raised in the course of the argument, we have considered them but in view of our conclusion herein there is no necessity for us to expressly deal with each one of them. It would not alter
F our conclusion in any event.

[35] Accordingly, for the foregoing reasons we allowed the appeals.

[36] My learned brothers have read this judgment in draft and agree with its contents.

G *Appeal allowed.*

Reported by Lim Lee Na

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